

Tennis, Rachel

From: Donnan, John <John.Donnan@kaiseral.com>
Sent: Thursday, July 24, 2014 6:15 PM
To: Tennis, Rachel
Cc: Mercado, Rebecca; mlow@mattlowassociates.com
Subject: RE: Yosemite Slough

Ms. Tennis,

We respectfully disagree that KACC's liability related to the Site (as defined in your email below) was not discharged in KACC's bankruptcy.

As we previously explained, the August 17, 2003 Consent Decree that you reference and that previously has been provided to USEPA categorizes each site with respect to which KACC has been, could be, or will in the future be alleged to be responsible for environmental contamination as either a "Liquidated Site," a "Discharged Site," a "Debtor-Owned Site," a "Reserved Site," or an "Additional Site."

As you note below, the Site is connected to the Bay Area Drum Site. The Bay Area Drum Site is expressly defined as a Liquidated Site. See Consent Decree at pg. 6, ¶ I.M. Further, a "Liquidated Site" under the Consent Decree "shall be construed to include (i) for those sites now or hereafter included on the NPL, all areas of a site as defined by EPA for purposes of the NPL, including any later expansion of such site as may be determined by EPA, and any affected natural resources, or (ii) for those sites or portions of sites not included on the NPL, all areas and natural resources affected or potentially affected by the release or threatened release of hazardous substances." Consent Decree at pg. 8, ¶ I.M. The Bay Area Drum site has not been included on the NPL; accordingly, for purposes of the Consent Decree, the Bay Area Drum site includes "all areas and natural resources affected or potentially affected by the release or threatened release of hazardous substances." As a result, under the express terms of the Consent Decree, the Site is considered part of the Bay Area Drum site for purposes of the Consent Decree and thus is a Liquidated Site. Under the Consent Decree, USEPA covenanted not to file a civil action or to take any administrative or other action against KACC pursuant to Sections 106 or 107 of CERCLA, 42 U.S.C. §§9606 or 9607, Section 7003 of RCRA, 42 U.S.C. § 6973, or any similar state laws with respect to each of the Liquidated Sites, including the Bay Area Drum site and, for the reasons outlined above, the Site. See Consent Decree at pg. 33, ¶ 18.

Even, however, if the Site is not considered a Liquidated Site notwithstanding its clear connection to the Bay Area Drum Site, the Site then would be an Additional Site. Paragraphs 7 through 9 on pages 23-27 of the Consent Decree discuss the treatment of Additional Sites. Importantly, Paragraph 7 expressly provides:

"With respect to all Additional Sites, all liabilities and obligations of the Debtors to the Settling Federal Agencies and the States under Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607, Section 7003 of RCRA, 42 U.S.C. § 6973, and Similar State Laws arising from Prepetition acts, omissions or conduct of the Debtors or their predecessors, including without limitation the Prepetition generation, transportation, disposal or release of hazardous substances, wastes or materials or dangerous wastes or the Prepetition ownership or operation of hazardous waste or hazardous substance sites and/or facilities and state counterparts, shall be discharged under Section 1141 of the Bankruptcy Code by the confirmation of a Plan of Reorganization"

See Consent Decree at pg. 24, ¶ 7 (emphasis added). Regardless of when USEPA discovered the Site or KACC's alleged connection to the Site, any potential liability of KACC concerning the Site could only be based on prepetition acts, omissions or conduct and thus, even if the Site is not a Liquidated Site, any potential liability nonetheless was discharged.

This was purposeful and negotiated by KACC and the United States specifically to resolve and avoid the kinds of disputes raised by your email. The parties addressed the Sites they knew about then, such as the Bay Area Drum Site, through the provisions governing Liquidated Sites, Discharged Sites, a Debtor-Owned Sites, and Reserved Sites. They then addressed all future sites through the provisions governing Additional Sites. See Consent Decree at pg. 3, ¶ 1.A. (defining “Additional Sites” to be “all sites and properties, including, without limitation, all facilities, as that term is defined in CERCLA, other than the Liquidated Sites, the Discharged Sites, the Debtor-Owned Sites and the Reserved Sites”). They recognized that sometimes KACC would be able to prove that USEPA had enough information, perhaps through its many records, by the bankruptcy bar date to “fairly contemplate” KACC’s liability and thus that it would not have any liability. And, they recognized that sometimes USEPA would prevail in that argument. They further recognized that litigation over these matters would be expensive and time consuming. Given this, they made an express, knowing compromise. For these “Additional Sites,” KACC would accept some liability even if USEPA could have “fairly contemplated” KACC’s liability and, in exchange, USEPA compromised to limit that liability. As set forth in Paragraph 7, rather than imposing any direct liability on KACC or KACC being subject to any action to remediate an Additional Site, any enforcement by USEPA must come through the liquidation of a settlement amount to be paid in the same manner and at the same rate as were prepetition, general unsecured claims in KACC’s bankruptcy. It also is important that USEPA agreed that it shall not issue or cause to be issued any unilateral order or seek any injunction against KACC under Section 106 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), Section 7003 of the Resource Conservation and Recovery Act of 1976 (RCRA), or any similar laws arising from the prepetition acts, omissions or conduct of KACC or its predecessors with respect to any Additional Sites. See Consent Decree at pg. 24, ¶ 7.

Thus, we believe that the Site is a Liquidated Site for which any liability that KACC had has been fully discharged. But, even if the Site is not a Liquidated Site, it is an Additional Site. If it is an Additional Site, any liability still was discharged in KACC’s bankruptcy, but KACC may owe the liquidated amount described in Paragraph 7 of the Consent Decree in certain circumstances. See *id.*

For these reasons, while DCOLLC will continue to cooperate with USEPA, it respectfully declines to participate in response or remediation activities at the Site or to engage in the PRP mediation process. Please contact me if you have any questions or wish to discuss these matters further.

Thank you.

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From: Tennis, Rachel [mailto:Tennis.Rachel@epa.gov]
Sent: Wednesday, July 16, 2014 9:20 AM

To: Donnan, John
Cc: Mercado, Rebecca; mlow@mattlowassociates.com
Subject: RE: Yosemite Slough

Dear Mr. Donnan:

I write in response to your letter of May 21, 2014 on behalf of DCO Management LLC, the corporate successor of Kaiser Aluminum & Chemical Corp. ("KACC"), regarding the Yosemite Slough Superfund Site ("Site"). EPA does not agree that KACC's liability related to the Site was discharged during bankruptcy. As stated in your letter, EPA and KACC entered into a Consent Decree on August 17, 2003, and KACC's Plan of Reorganization went into effect on July 6, 2006. EPA's claim did not arise until several years after the Effective Date of the Plan. *See, e.g., In re Jensen*, 995 F.3d 925, 930 (9th Cir. 1993) (holding that an environmental claim arises pre-petition and can be discharged only when the release of hazardous substances could have been "fairly contemplated by the parties"). EPA did not become aware of the Yosemite Slough Site or the relationship between the Bay Area Drum facility and the Yosemite Slough Site until after the Effective Date of the Plan. The Regional Water Quality Control Board requested EPA's assistance with Yosemite Slough in 2007. EPA then undertook an investigation of potentially responsible parties and issued a General Notice Letter to KACC on February 21, 2008. EPA therefore encourages DCO Management to participate in the PRPs' mediation process and in future settlement discussions with EPA.

Regards,

Rachel Tennis
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From: Mercado, Rebecca [<mailto:Rebecca.Mercado@kaiseral.com>]
Sent: Wednesday, May 21, 2014 2:41 PM
To: Tennis, Rachel
Cc: Donnan, John; mlow@mattlowassociates.com
Subject: Yosemite Slough

Ms. Tennis,

Please find attached our response to Notice of Intent to Issue Special Notice Letters for the Yosemite Slough Site in San Francisco, California.

Thank you.

Rebecca

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